

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,
CALIFORNIA STATE PRISON AT
SAN QUENTIN,

Respondent-Appellant,

vs.

DONALD LEE BLABON,

Petitioner-Appellee.

FEB 26 1966

No. 20976

APPELLANT'S OPENING BRIEF

THOMAS C. LYNCH
Attorney General of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

DERALD E. GRANBERG
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0357

Attorneys for Respondent-Appellant

FILED

JUL 1 1966

WM. B. LUCK, CLERK

NOV 4 1965

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	
A. Proceedings in the State Courts	1
B. Proceedings in the Federal Court	3
APPELLANT'S CONTENTION	4
ARGUMENT	4
CONCLUSION	12



TABLE OF CASES

	<u>Page</u>
<u>In re Keddy</u> 105 Cal.App.2d 215, 233 P.2d 159 (1951)	7
<u>In re Morehead</u> 107 Cal.App.2d 346, 237 P.2d 335 (1950), <u>disapproved on</u> <u>other grounds in Thurmond v.</u> <u>Superior Court, supra</u>	8
<u>In re Stoneham</u> 232 Cal.App.2d 337, 42 Cal.Rptr. 741 (1965)	8
<u>McNally v. Hill</u> 293 U.S. 131 (1934)	5
<u>People v. Alvin</u> 111 Cal.App.2d 800, 245 P.2d 660 (1952)	7
<u>People v. Barzee</u> 213 Cal.App.2d 139, 28 Cal.Rptr. 692 (1963)	9-10
<u>People v. De La Roi</u> 185 Cal.App.2d 469, 8 Cal.Rptr. 260 (1960)	7
<u>People v. Hymes</u> 161 Cal.App.2d 668, 327 P.2d 219 (1958)	6, 11
<u>People v. Wells</u> 112 Cal.App.2d 672, 246 P.2d 1023 (1952)	7
<u>Thurmond v. Superior Court</u> 49 Cal.2d 17, 314 P.2d 6 (1957)	8, 11
<u>Gross v. Superior Court</u> 42 Cal.2d 816, 270 P.2d 1025 (1954)	11

TEXTS, STATUTES & AUTHORITIES

	<u>Page</u>
California Penal Code	
§ 1466, subd. 2(a)	11
§ 1466, subd. 2(c)	11
California Welfare and Institutions Code	
§ 5500	8
§ 5501	7, 9
§ 5503	10
§ 5512.5	10
Annot. 24 A.R.L.2d 350 (1952)	5
20 Am. Jur. Insane Persons	
§ 51 (1960)	5
Rule 2 of the California Rules on Appeal	11

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,
CALIFORNIA STATE PRISON AT
SAN QUENTIN,

Respondent-Appellant,

vs.

DONALD LEE BLABON,

Petitioner-Appellee.

No. 20976

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of this Court is conferred by Title 28 United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

The proceedings in the State court as relevant to this appeal are set forth in the order of the District Court as follows:

"On November 7, 1960 a criminal complaint was filed in the Justice Court of the Corning Judicial District of California, charging

petitioner with having violated California Penal Code section 311.1 (indecent exposure). He was arraigned on the same day, and the minutes of the Justice Court state that:

"'Complaint filed. Defendant in Court, was arraigned, informed of right to counsel, waived counsel, entered a plea of not guilty and requested jury trial. Jury trial set for Nov. 22, 1960....' (Ex. B attached to respondent's return.)

"Petitioner was subsequently convicted of the offense charged after a trial by jury in which he acted as his own defense counsel. Following petitioner's conviction, the Court adjourned the proceedings and certified petitioner to the Superior Court of Tehama County for proceedings pursuant to California Welfare and Institutions Code §§ 5500 et seq. On May 2, 1961 petitioner was adjudged a mentally disordered sex offender and committed to the custody of the Director of the California Department of Mental Hygiene for an indeterminate period by the Superior Court" (CT 64-65).^{1/}

1. As hereinafter used, "CT" refers to the United States District Court Clerk's record on appeal filed in this Court as the transcript of record.



B. Proceedings in the Federal Court

On September 1, 1965, petitioner filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On September 1, 1965, an order to show cause was issued (CT 22) and on September 29, 1965, respondent filed a return to the order to show cause (CT 56). On October 29, 1965, petitioner filed a traverse to respondent's return to the order to show cause (CT 38).

Subsequently, the District Court appointed counsel to represent petitioner and ordered an evidentiary hearing which was conducted before the District Court on December 8, 1965. On January 3, 1966, points and authorities were filed by petitioner's counsel in support of petitioner's application for writ of habeas corpus in accordance with leave granted by the District Court at the evidentiary hearing (CT 51). Supplemental points and authorities in opposition to the petition for writ of habeas corpus were filed by respondent on January 11, 1966, in accordance with leave granted by the District Court at the evidentiary hearing (CT 55).

On March 31, 1966, the order of the District Court discharging petitioner from custody was filed (CT 64). The order provided that its execution was

stayed ten court days to permit respondent to file a notice of appeal if we so desired and that should such notice of appeal be filed, the order was further stayed and that custody of petitioner was not to be disturbed until further order of the court (CT 70).

Respondent's notice of appeal was filed on April 5, 1966 (CT 75). A certificate of probable cause issued by the District Court was filed that same day (CT 74).

APPELLANT'S CONTENTION

The District Court erred in holding that it had jurisdiction to examine the validity of petitioner's justice court conviction for indecent exposure since his present confinement in State prison is pursuant to his civil commitment from superior court as a mentally disordered sex offender.

ARGUMENT

By application for a writ of habeas corpus presented to the District Court, petitioner sought his release from State prison where he is confined under a civil commitment from the State superior court as a mentally disordered sex offender. He sought this relief on the ground that the justice court criminal conviction for indecent exposure which preceded and afforded the jurisdictional basis for his present commit-

ment is invalid since it was secured at a time when he was denied his constitutional right to the assistance of counsel. In our return to the order to show cause issued by the District Court, we took the position that petitioner had presented no federal question since his confinement as a mentally disordered sex offender is based solely upon a judicial determination had in a collateral civil proceeding and is not pursuant to his presently suspended criminal conviction. Cf. McNally v. Hill, 293 U.S. 131 (1934).

The District Court resolved this jurisdictional question by concluding that a valid criminal conviction is a jurisdictional prerequisite to commitment as a mentally disordered sex offender and that if the criminal conviction is subsequently invalidated, the commitment as a mentally disordered sex offender must also fall (CT 65-68). Recognizing that there is no federal constitutional requirement that the underlying criminal conviction be free of reversible error, see generally Annot. 24 A.R.L.2d 350 (1952); 20 Am. Jur. Insane Persons § 51 (1960), the District Court below imposed such a requirement as a matter of state law.

This is clear from the court's conclusion that "as a matter of state law a valid criminal conviction

is a jurisdictional prerequisite to commitment as a mentally disordered sex offender" and from its holding that if "the criminal conviction is unlawful, then the superior court order (committing petitioner as a mentally disordered sex offender) is no longer a valid basis for continued custody, since it was entered without jurisdiction" (CT 68). In effect then, the District Court held that if the criminal conviction which afforded the jurisdictional basis for the commitment proceeding was subsequently set aside, this had the effect of voiding ab initio the commitment proceeding itself. We submit that by so holding the District Court misinterpreted applicable state law.^{2/}

Under California law, proceedings for the commitment of a person as a mentally disordered sex offender are civil in nature and are collateral to the criminal proceeding. People v. Hymes, 161 Cal.App.2d 668, 673, 327 P.2d 219 (1958). A person committed and confined as a mentally disordered sex offender is not confined for the commission of a criminal offense, but rather because it has been judicially determined that

2. Although we do not present the issue here, we do not concede that the due process clause of the federal Constitution imposes upon the states a blanket requirement that counsel be appointed for indigent defendants in all misdemeanor prosecutions.

he is a mentally disordered sex offender. In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159 (1951). He is confined pursuant to a law whose primary purpose is to protect society against the activities of sexual perverts, People v. Wells, 112 Cal.App.2d 672, 674, 246 P.2d 1023 (1952), and to sequester such unfortunates away from society so long as they constitute a menace to its health or safety. People v. Alvin, 111 Cal.App.2d 800, 804-05, 245 P.2d 660 (1952).

While the person is under commitment as a mentally disordered sex offender, the criminal proceeding against him is suspended and the trial court is precluded from imposing any punishment on the criminal conviction. It is only when the proceedings relating to his commitment as a mentally disordered sex offender have run their course, that the criminal proceedings may be resumed and sentence imposed. People v. De La Roi, 185 Cal.App.2d 469, 472, 8 Cal.Rptr. 260 (1960).

A proceeding for commitment of a person as a mentally disordered sex offender may be initiated immediately following a conviction and is initiated by adjourning the criminal proceeding and certifying the convicted person for examination on the issue of whether he is in fact a mentally disordered sex offender. Cal. Welf. & Inst. Code § 5501. The only requirement is

that there be a conviction and there is no requirement that the conviction shall have become final. See Thurmond v. Superior Court, 49 Cal.2d 17, 20, 314 P.2d 6 (1957); In re Morehead, 107 Cal.App.2d 346, 350, 237 P.2d 335 (1950), disapproved on other grounds in Thurmond v. Superior Court, supra. For this very reason there can be no requirement that the conviction be free of reversible error.

The issue which is resolved in a proceeding for the commitment of a person as a mentally disordered sex offender is whether he is one who "by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." Cal. Welf. & Inst. Code § 5500. Insofar as petitioner's commitment as a mentally disordered sex offender is concerned, the real significance of his justice court criminal conviction for indecent exposure is that it served to bring him within the class of persons against whom commitment proceedings could be initiated. See In re Stoneham, 232 Cal.App.2d 337, 340-41, 42 Cal.Rptr. 741 (1965).

It is, of course, true that but for petitioner's misdemeanor conviction for indecent exposure, the superior court would have lacked jurisdiction to proceed with his commitment as a mentally disordered sex offender. This

is not to say, however, that the validity of his superior court commitment as a mentally disordered sex offender hinges upon the continued validity of the misdemeanor conviction for indecent exposure. Petitioner stood convicted of a criminal offense as that term is used in section 5501 of the California Welfare and Institutions Code as of the time the jury returned its verdict finding him guilty of indecent exposure. That criminal conviction was existing and presumptively valid when the civil commitment proceeding occurred and it afforded the jurisdictional basis for that proceeding.

We submit that the validity of a superior court order committing a person as a mentally disordered sex offender was never intended under state law to be dependent upon the continued validity of the criminal conviction which afforded its jurisdictional basis. In addition to those matters discussed above, this conclusion also draws persuasive support from a consideration of the procedural protections which are available to a person in such a commitment proceeding. For example, the statutes setting forth the procedures to be followed at commitment proceedings concerning alleged mentally disordered sex offenders are carefully drafted to insure for them those procedural protections considered essential to due process. See People v. Barzee,

213 Cal.App.2d 139, 141, 28 Cal.Rptr. 692 (1963).

It is apparent from the commitment order marked "Exhibit A" and attached to our return to the District Court's order to show cause (CT 33-34) that petitioner was afforded in full measure those procedural protections. The question of whether he was a mentally disordered sex offender was passed upon preliminarily at a hearing conducted by the superior court. Petitioner then underwent an observational commitment at a state hospital after which he was returned to the superior court which after a second hearing again concluded that he was a mentally disordered sex offender. Finally, pursuant to the provisions of section 5512.5 of the California Welfare and Institutions Code, petitioner was afforded a jury trial on the issue of whether he was a mentally disordered sex offender. The commitment order reflects that petitioner was represented by counsel. See Cal..Welf. & Inst. Code § 5503.

Additionally, petitioner had available under state law appellate remedies for the independent review of both the superior court order committing him as a mentally disordered sex offender and of the justice court criminal conviction. Even though the criminal proceeding had been suspended, he could have secured an immediate appellate review of that misdemeanor conviction by moving

for a new trial and, if that motion was denied, by taking an appeal from the order denying that motion. Cal. Pen. Code § 1466, subd. 2(c); see Thurmond v. Superior Court, supra.

Petitioner could have secured an appellate review of the order by the superior court committing him as a mentally disordered sex offender since such an order is appealable as a final judgment in a special proceeding. Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025 (1954); People v. Hymes, supra. Since deemed a civil proceeding, Rule 2 of the California Rules on Appeal would have permitted the filing of such a notice of appeal at any time within 60 days from the date of entry of the order.

Furthermore, if at the conclusion of petitioner's civil commitment as a mentally disordered sex offender some penalty is imposed pursuant to his criminal conviction, he may at that time challenge that conviction. Indeed, if a sentence is imposed upon that conviction, petitioner will be in a position to prosecute an appeal in the state courts. Cal. Pen. Code § 1466, subd. 2(a).

We submit that the District Court below misinterpreted state law when it held that the validity of the superior court order committing petitioner as a mentally disordered sex offender depended upon the

continued validity of the justice court criminal conviction. This error, of course, led the District Court to the erroneous conclusion that it had jurisdiction to examine the validity of petitioner's justice court conviction for indecent exposure. Since petitioner's present confinement in state prison is pursuant to his commitment as a mentally disordered sex offender and not pursuant to his criminal conviction for indecent exposure, the District Court below lacked jurisdiction and its order must be reversed.


CONCLUSION

For the foregoing reasons, appellant respectfully submits that the order granting the writ of habeas corpus entered by the District Court below should be reversed and the proceeding dismissed.

Dated: July 1, 1966

THOMAS C. LYNCH
Attorney General of California

ALBERT W. HARRIS, JR.
Assistant Attorney General


DERALD E. GRANBERG
Deputy Attorney General

Attorneys for Respondent-Appellant.

rms
CR-SF
65-437

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

July 1, 1966

A handwritten signature in dark ink, reading "Derald E. Granberg". The signature is written in a cursive, flowing style with a large initial 'D' and 'G'.

DERALD E. GRANBERG
Deputy Attorney General
of the State of California

